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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

ARMOND J. EITMANN,

PETITIONER

-VERSUS-

NEW ORLEANS PUBLIC SERVICE, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FROM OPINION RENDERED APRIL 23, 1984 BY UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether federal jurisdiction as applicable under 29 U.S.C. Section 185 (a), was properly invoked in this civil action?

Whether a separate oral contract existing between an employer and employee was superseded by the provisions of a collective bargaining agreement?

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OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana entered its Judgment in this matter on November 2, 1982, and is not reported.

The United States Court of Appeals, Fifth Circuit, rendered its opinion on April 23, 1984. The court denied petitioner's Petition for Rehearing and Suggestions for Rehearing En Banc on May 31, 1984.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, was rendered on April 23, 1984. The Petition for Rehearing and Suggestions for Rehearing En Banc filed on May 14, 1984 were denied by the court on May 31, 1984. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the statute at issue herein are:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a)(1976).

The contract at issue herein was an oral contract which consisted of the following terms:

> When an employee of New Orleans Public Service, Inc. sustained a job related injury which rendered him incapable of continuing to perform his duty, New Orleans Public Service, Inc. would maintain that employee in

its employ at the rate of pay being earned by the employee prior to injury, despite the fact that easier or less demanding work would be required to be provided in order to maintain said employment.

Record - Argument of Counsel-not transcribed; Suit on Contract, Paragraph III filed Civil District Court for the Parish of Orleans, State of Louisiana on March 1, 1982. (See Appendix).

STATEMENT OF THE CASE

Petitioner, ARMOND J. EITMANN, was employed by respondent, NEW ORLEANS PUBLIC SERVICE, INC. (NOPSI) in 1969 and worked for said company until he was discharged on November 25, 1977. At the time of petitioner's employment with NOPSI, as a substantial and primary portion of the consideration of his employment and the motivation for accepting employment with the respondent, petitioner was informed by NOPSI and by

knowledge of the practices of NOPSI that when an employee of respondent sustained a job related injury which rendered him incapable of continuing to perform his duty, respondent would maintain that employee in the employ of respondent at the rate of pay being earned by the employee prior to the injury, despite the fact that easier or less demanding work would be required to be provided in order to maintain said employment.

On the strength of the representations by NOPSI and the practices of NOPSI in guaranteeing full employment to its employees despite any job related injury sustained, until that employee recovered in full or until the employee reached retirement age, petitioner accepted employment with NOPSI and performed satisfactorily as a lineman until he sustained substantial injuries to his back on

February 17, 1976.

NOPSI initially honored its employment agreement with petitioner by paying his full salary during his period of medical treatment and convalescense and providing lighter work suitable to petitioner's capabilities following back surgery. NOPSI also reaffirmed the agreement in verbal representations to petitioner.

Despite the initial compliance with its work agreement on or about November, 1977, NOPSI reversed its position and refused to provide lighter work for petitioner and refused to maintain him on his full salary and, in fact, discharged petitioner from respondent's employ.

As a result of the actions of respondent in discharging petitioner contrary to the agreement and understanding

which had existed between petitioner and NOPSI and despite NOPSI's contractual obligations to petitioner, petitioner has been unemployed since November 25, 1977, and continues to be unemployed because the injuries which he has sustained prevent him from obtaining any other work.

Action was commenced in the form of a suit on contract by petitioner against NOPSI in the Civil District Court of the State of Louisiana in and for the Parish of Orleans on March 1, 1982. The above described action was removed to the United States District Court for the Eastern District of Louisiana based upon respondent's Petition for Removal which alleged that the action herein fell under the provisions of Section 301 of the Labor

Management Relations Act, 29 U.S.C. Section 185(a)(1976).

The United States District Court for the Eastern District of Louisiana granted respondent's Petition for Removal on the grounds that the federal courts possessed original jurisdiction over the claim herein pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, because the action amounted to a suit for violation of the collective bargaining agreement between NOPSI and the labor organization which represented petitioner.

On June 22, 1982, the district court granted respondent's Motion for Summary Judgment finding that the contract at issue herein was either integrated into or superseded by the

collective bargaining agreement which existed between NOPSI and the labor organization representing the petitioner and that petitioner's failure to exhaust the grievance procedures as outlined in the collective bargaining agreement precluded any action on his behalf in federal court. The district court did not, however, assign reasons for its Judgment.

Petitioner opposed respondent's Motion for Summary Judgment maintaining that a separate contract existed between NOPSI and the petitioner which was neither a part of nor superseded by the collective bargaining agreement. Additionally, petitioner appealed the district court's decision regarding respondent's Motion for Summary Judgment urging that the federal court did not

have jurisdiction over the subject matter at issue because petitioner's suit on contract was based upon a dispute arising out of a contract by and between the petitioner and repondent, his employer, and was not based upon a dispute regarding any contract by and between a labor union and the respondent.

Upon appeal to the United States Court of Appeals, Fifth Circuit, the court rendered its decision on April 23, 1984, holding that a state law claim of an employee, who was covered by a collective bargaining agreement, for breach of an individual employment contract was preempted by federal labor law and that a federal court had original subject matter jurisdiction over the action despite absence of a federal claim on the face of the complaint making removal to federal court proper.

The petitioner filed a Petition for Rehearing and Request for Rehearing En Banc on May 14, 1984. The court denied the Petition for Rehearing and Request for Rehearing En Banc on May 31, 1984.

Petitioner files the instant Petition for Writ of Certiorari for review of the federal court's opinions rendered in this case as described supra.

BASIS FOR FEDERAL JURISDICTION BELOW

The United States District Court for the Eastern District of Louisiana granted respondent's Petition for Removal on March 29, 1982, on the grounds that original jurisdiction existed with the federal court pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. It should be noted that petitioner continues to object to the district court's

decision regarding removal of the instant case to the federal court urging that petitioner's suit on contract states a breach of contract on the part of the respondent falling under the jurisdiction of the state courts.

REASONS FOR GRANTING WRIT

Petitioner seeks review of the decisions rendered in the federal courts below for the following reasons:

The instant case was removed upon petition of respondent from the Civil District Court for the State of Louisiana in and for the Parish of Orleans to the United States District Court for the Eastern District of Louisiana based upon the federal courts' original jurisdiction over suits by and against labor organizations. The applicable statute, 29 U.S.C.A. Section 185(a), indicates

that any district court of the United States shall have jurisdiction over suits brought "for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce",... "without respect to the amount in controversy or without regard to the citizenship of the parties." (Emphasis Added).

However, petitioner's suit is not, as respondent contends, based upon any collective bargaining agreement in effect between respondent and the labor organization which represented petitioner during the course and scope of his employment with respondent. Rather, this suit is grounded upon breach of a separate, unilateral contract by and between the petitioner and respondent entered into before petitioner became a member of any

labor organization and re-affirmed after employee's injury.

The contract sued upon concerns the offer made by respondent to petitioner wherein in return for petitioner's acceptance of the personally hazardous employment as lineman, in the event he was injured, the employer, respondent, would retain the lineman on its payroll until he could return to work or retire. Petitioner accepted this offer. When he was subsequently injured, respondent breached the above described and refused to retain petitioner on the payroll until he recovered and/or retired.

The relief sought by the petitioner therefore, is not afforded under the terms of 29 U.S.C.A. Section 185. Petitioner's suit on contract is <u>not</u> based upon any violations of labor agreement

entered into by and between petitioner's employer, the respondent, and a labor organization. Additionally, there is no suggestion that 29 U.S.C.A. Section 185 offers an exclusive remedy to an employee with regard to labor disputes. By its very terms the statute encompasses only suits for "violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce." (Emphasis added).

Petitioner asserts that his claim sets forth issues to be determined in a proceeding for remedies provided under the laws of the State of Louisiana for breach of contract committed by respondent, said breach of contract being within the jurisdiction and authority of the courts of the State of Louisiana. The petitioner denies that this matter

is a civil action arising under Section 301(a) of the National Labor Relations Act, as amended (29 U.S.C.A. Section 185 (a)). Petitioner asserts that because the district court did not have subject matter jurisdiction over the cause raised herein by petitioner, the district court's granting of defendant appellee's Motion for Summary Judgment, upheld by the Fifth Circuit Court of Appeals, was in error.

Additionally, any contention on the part of the respondent that the separate contract at issue is integrated into the collective bargaining agreement is false.

The Supreme Court has held that individual contracts between an employer and an employee are not precluded by the existence of a collective bargaining agreement is false.

The Supreme Court has held that individual contracts between an employer and an employee are not precluded by the existence of a collective bargaining agreement is false.

The Supreme Court has held that individual contracts between an employer and an employee are not precluded by the existence of a collectibe bargaining agreement. J.I. CASE v. N.L.R.B., 321 U.S. 337-339, 64 S.Ct. 580-581, 88 L.Ed. 762 (1944).

The terms of the individual employment contract are preempted only when they are inconsistent with the terms and conditions of the collective bargaining agreement.

At the time of petitioner's employment with the respondent as a substantial and primary portion of the consideration for his employment and the motivation for

accepting employment with the respondent, petitioner was informed both by respondent and by knowledge of the practices of the respondent that when an employee of NEW ORLEANS PUBLIC SERVICE, INC. sustained a job-related injury which rendered him incapable of continuing to perform his duties, the respondent would maintain that employee in the employ of NEW ORLEANS PUBLIC SERVICE, INC. at the rate of pay being earned by the employee prior to the injury, despite that fact that easier or less demanding work would be required to be provided in order to maintain said employment.

The terms of the individual employment contract entered into by the employee and employer herein are not inconsistent with the terms of the collective bargaining agreement and the appellant is not, therefore, precluded from a state

claim based on its breach.

Further, the terms and conditions of the individual employment contract do not frustrate any federal labor law policy. Specific, individual employment contracts meant to provide added inducement for hazardous work do not encroach on the functional authority of the national labor laws. Additionally, under SAN DIEGO BUILDING TRADES COUNCIL vs. GARMON, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), the governing body of the national labor laws does not displace state regulation of such individual employment contracts which relate to a contract within the coverage of Section 301 of the Labor Management Relations Act. See also, LINN v. PLANT GUARD WORKERS, 383 U.S. 58, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966); FARMERS v. CARPENTERS, 430 U.S. 290, 97 S.Ct. 1056, 51 L.

Ed.2d 338 (1977).

CONCLUSION

Petitioner seeks a writ of certiorari for review of the decision of the district court herein, affirmed by the United States Court of Appeals, Fifth Circuit, wherein petitioner's suit was dismissed, petitioner urging that his suit on contract did not come within the provisions of Section 301 of the Labor Management Act and that the dismissal of his suit was granted by the district court without proper jurisdiction and was in error.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari have been forwarded to G. PHILLIP SHULER, Attorney at Law, Chaffe, McCall, Phillips, Toler & Sarpy, 1500 First National Bank of Commerce Building, New Orleans, Louisiana, by United States mail, postage prepaid and properly addressed, this day of September, 1984.

FERDINAND J. KLEPPNER

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ARMOND J. EITMANN	CIVIL ACTION
VERSUS	NO.: 82-1231
NEW ORLEANS PUBLIC SERVICE, INC.	SECTION "J"

JUDGMENT

The court having previously granted the Motion of Defendant for Summary Judgment,

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of defendant, NEW ORLEANS PUBLIC SERVICE, INC., against Plaintiff, ARMOND J. EITMANN, dismissing said Plaintiff's suit, with costs.

Dated at New Orleans, Louisiana, this 1st day of November, 1982.

/s/ Nelson B. Jones
NELSON B. JONES, Clerk

APPROVED AS TO FORM:

/s/ Patrick E. Carr
UNITED STATES DISTRICT
JUDGE

DATE OF ENTRY:

November 2, 1982

ARMOND J. EITMANN,

Plaintiff-Appellant

v.

NEW ORLEANS PUBLIC SERVICE,

INC., Defendant-Appellee.

No. 82-3705.

United States Court of Appeals,

Fifth Circuit.

April 23, 1984.

Employee brought suit in a state court against his employer for breach of his individual employment contract. The case was removed to United States District Court for the Eastern District of Louisiana, Patrick E. Carr, J., which granted summary judgment in favor of employer, and employee appealed. The Court of Appeals, Randall, Circuit Judge, held that: (1) state law claim of employee, who was covered by collective

bargaining agreement and who sought to redress a grievance subject to its terms and a remedy awardable by arbitrator, for breach of individual employment contract was preempted by federal labor law, and (2) where employee's state cause of action was preempted by Labor Management Relations Act, federal court had original subject matter jurisdiction over the action despite absence of a federal claim on the face of the complaint and therefore removal of the case was proper.

Affirmed.

1. LABOR RELATIONS, 45,777

Federal jurisdiction is properly invoked if complaint alleges violation of a collective bargaining agreement affecting interstate commerce; to extent that state law would otherwise provide a remedy for contractual breach, it is preempted. Labor Management Relations

Act, 1947, Section 301, 29 U.S.C.A., Section 185.

2. LABOR RELATIONS, 416.1, 416.3

A grievant may file suit without fulfilling exhaustion requirement if union wrongfully refuses to process the grievance, employer's conduct amounts to a repudiation of contract's remedial procedures, or exhaustion would be futile because of lack of an impartial decision maker.

3. LABOR RELATIONS, 45

State law claim of employee, who was covered by collective bargaining agreement and who sought to redress a grievance subject to its terms and a remedy awardable by arbitrator, for breach of individual employment contract was preempted by federal labor law. Labor Management Relations Act, 1947,

Section 301, 29 U.S.C.A. Section 185.

4. REMOVAL OF CASES, 19(1)

A defendant may not remove a case to federal court unless plaintiff's complaint establishes that the case "arises under" federal law. 28 U.S.C.A. Section 1337.

5. REMOVAL OF CASES, 25(1)

A plaintiff may not defeat removal by fraudulent means or by artfully omitting to plead essential federal issues in the complaint.

6. REMOVAL OF CASES, 19(5)

Where employee's state cause of action was preempted by Labor Management Relations Act, federal court had original subject matter jurisdiction over the action despite absence of a federal claim on the face of the complaint and therefore removal of the case was proper. Labor Management Relations Act, 1947,

Section 301, 29 U.S.C.A. Section 185; 28 U.S.C.A. Section 1337.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RUBIN and RANDALL, Circuit Judges, and MITCHELL*, District Judge.

RANDALL, Circuit Judge:

The threshold issue posed by this appeal is whether federal jurisdiction was properly invoked in removing the action to federal court from the state court in which it was brought. Because we hold that the district court had original jurisdiction over the action, and because the appellant advances no arguments challenging the district court's summary judgment on a ground

*District Court Judge for the Eastern District of Louisiana, sitting by designation.

other than lack of subject matter jurisdiction, we affirm.

I. Factual and Procedural Background.

The plaintiff, Armond Eitmann, was employed from 1969 to 1977 by the defendant, New Orleans Public Service, Inc. ("NOPSI"), as a lineman in NOPSI's Overhead Lines Division. Eitmann contends that prior to being hired, he was advised by the Division Manager that, due to the hazardous nature of linemen's work, a lineman who suffered work-related injuries would receive full compensation during any period of total or partial disability, or until retirement.

In February, 1976, Eitmann was injured on the job. NOPSI paid him full salary during his convalescence. He was reinjured later that year and was assigned to modified duty at full pay. In November, 1977, NOPSI discharged Eitmann,

advising him that it had no suitable work available that he was capable of performing.

At all times during his employment with NOPSI, Eitmann was a member of the Cooperative Electric Distribution Division Employees' Association (the "Union"), which maintained a collective bargaining agreement with NOPSI. The agreement provided, inter alia:

> SECTION 7. It is agreed that any employee has the right to leave the service of the Company individually at any time, and in like manner, the Company has the right, at its discretion, to dispense with the services of any employee, provided, however, that in the case of discharge for cause, the employee or this Association, represent-

ing said employee may, if it so elects, grieve the discharge and after the grievance procedure has been exhausted, may submit said dismissal to arbitration in accordance with the provisions of this Agreement.

SECTION 8. If an employee covered by this Agreement should have a grievance arising out of the interpretation or application of specific provisions of this Agreement, or claim unjust treatment or that the dismissal was unjust, relief may be sought through the following grievance procedure:

* * * * * * *

(A four-step grievance procedure, culminating in binding arbitration, followed.)

After his discharge, Eitmann invoked the first two steps of the grievance process--presenting a written notice of his allegedly unjust dismissal to the General Manager, and meeting for discussion with a NOPSI Vice President--but abandoned the procedure when his grievance was denied at both junctures. He filed suit in state court seeking reinstatement,[1] alleging breach not of the collective bargaining agreement but of his individual employment contract with NOPSI, whereby the latter allegedly had promised to keep him on the payroll at full compensation in the event of a disabling work-related injury.

NOPSI petitioned for removal of the case to federal court pursuant to 28 U.S. C. Section 1441(b) (1976), asserting that Eitmann's claim arose under the Labor

1. Eitmann's original complaint sought lost future wages and retirement benefits. He later amended it to seek only reinstatement. See Record at 102-04.

Management Relations Act ("LMRA"), 29 U. S.C. Section 141 et seq. (1976), NOPSI alleged that Eitmann's action amounted to one for violation of a collective bargaining agreement between an employer and a labor organization representing employees in an industry affecting commerce and thus stated a claim arising under section 301 of the LMRA, 29 U.S.C. Section 185(a).[2] The district court granted the petition for removal and,

2. Section 301 provides:
(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citenship of the parties.

upon NOPSI's motion for summary judgment, dismissed the action.[3]

Eitmann appeals the dismissal of his action. He argues that the district court lacked jurisdiction over the subject matter of the suit, asserting that his claim did not arise under the collective bargaining agreement, but rather was grounded upon breach of Eitmann's individual contract of employment with NOPSI. Thus, he contends that removal was improper and urges us to remand the action to the state court whence it came. NOPSI argues that Eitmann's state-law

3. NOPSI removed for summary judgment on a number of grounds, including Eitmann's failure to exhaust the grievance procedure by the collective bargaining agreement. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). The district court did not specify the basis upon which it granted NOPSI's motion. Our affirmance is based on the failure to exhaust. See infra part IV.

contract claim is preempted by the LMRA, and that therefore his action necessarily arises under federal law despite the absence of any mention of federal law in his complaint and was properly removed.

II. Federal Preemption.

(1,2) Section 301 of the LMRA reflects a Congressional intent to promote industrial peace by ensuring uniform application of federal law to the enforcement of collective bargaining agreements. See Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). Thus federal jurisdiction is properly invoked if the complaint alleges the violation of a collective bargaining agreement affecting interstate commerce. To the extent that state law would otherwise provide a

remedy for the contractual breach, it is preempted. See, e.g., Republic Steel Corp. v. Maddox, 379 U.S. 650, 657, 85 S.Ct. 614, 618-19, 13 L.Ed.2d 580 (1965); Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95, 103, 82 S.Ct. 571, 576-77, 7 L.Ed.2d 593 (1962); Avco Corp. v. Aero Lodge No. 735, International Association of Machinists & Aerospace Workers, 376 F. 2d 337, 339-40 (6th Cir.1967), aff'd, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed. 2d 126 (1968). In a case involving the application of federal labor law, an employee asserting a violation of the collective bargaining agreement is bound by the terms of that agreement as to the method of enforcing his or her claim and, generally, is required to exhaust those remedies. See Vaca v.

Sipes, 386 U.S. 171, 184, 87 S.Ct. 903, 913-14, 17 L.Ed.2d 842 (1967); Republic Steel v. Maddox, 379 U.S. at 652-53, 85 S.Ct. at 616-17; Rabalais v. Dresser Industries, Inc., 566 F.2d 518, 519 (5th Cir. 1978).[4]

In this case, however, we are presented with a claim that, on its face, does not invoke the collective bargaining agreement. Eitmann asserts, rather, that the contract upon which his action is based is independent of the Union's agreement with NOPSI, and that it pertains to matters other than those governed by the collective bargaining agreement. NOPSI contends that Eitmann's

4. A grievant may file suit without fulfilling the exhaustion requirement if (1) the union wrongfully refuses to process the grievance; (2) the employer's conduct amounts to a repudiation of the contract's remedial procedures; or (3) exhaustion would be futile because of the lack of an impartial decision-maker. See Vaca v. Sipes, 386 U.S. 171, 184, 87 S.Ct. 903, 913-14, 17 L.Ed.2d 842 (1967); Rabalais v. Dresser Industries, Inc., 566 F.2d 518, 519 (5th Cir. 1978). None of these exceptions is applicable here.

claim is necessarily subsumed into the collective bargaining agreement.

In J.I. Case v. NLRB, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944), the Court established that, while individual contracts between employer and employee are not precluded by the existence of a collective bargaining agreement, to the extent that an individual contract and a collective bargaining agreement are inconsistent, the latter must prevail. Id. at 337-39, 64 S.Ct. at 580-81. The Court held inconsistent with a collective bargaining agreement any individual contract by which the employer would "incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by the collective agreement." Id. 321 U.S. at 339, 64 S.Ct. at 581. The Court expressly declined to hold that an indi-

vidual contract more advantageous than the collective bargaining agreement would e enforceable, but noted that the "practice and philosophy of collective bargaining looks with suspicion on such individual advantages." Id. at 338, 64 S. Ct. at 580. See also NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123 (1967) ("(National labor) policy...extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees... Thus only the union may contract the employee's terms and conditions of employment...").

(3) Eitmann contends that his alleged individual contract is not inconsistent with the terms of the collective bargaining agreement and thus, under J.I. Case,

he is not precluded from a state claim based on its breach. We are not persuaded, however, that the two agreements can be construed so independently of each other. J.I. Case specifically noted that individual contracts may not "be used to...limit or condition the terms of the collective agreement... Individual contracts cannot subtract from collective ones..." 321 U.S. at 337-39, 64 S.Ct. at 580-81. The oral agreement that Eitmann contends he entered into with NOPSI provided, essentially, for lifetime employment, regardless of his ability to perform any services for the employer; in other words, unlike all of the other employees covered by the collective bargaining agreement, Eitmann could not be discharged because of his physical inability to perform any services for

NOPSI.[5] We think that this alleged agreement clearly seeks to "limit or condition" the terms of the collective bargaining agreement, which established the terms and conditions of employment, including discharge. See Eitmann Dep. Exh. 15.[6] Section 8 of the agreement

5. At oral argument, Eitmann also took the position that, because section 7 of the collective bargaining agreement permitted an employee to grieve a dismissal that was "for cause" and his dismissal was not for cause, he was precluded from proceeding with a grievance under that section. This argument is specious. Essentially, Eitmann seeks a judicial determination whether his discharge was just. Clearly, however, the point of providing a grievance procedure for discharges "for cause" was to supply the grievant a process by which he may challenge the employer's characterization of its action. To find a conclusionary assertion that a discharge was not for cause a sufficient basis on which a grievant may avoid the grievance procedure would be to circumvent entirely the purpose and policy of the procedure's existence.

6. See also Republic Steel Corp. v. Maddox, 379 U.S. at 656, 85 S.Ct. at 618:
Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship.

provides that a discharged employee claiming unjust dismissal shall grieve his or her claim pursuant to the contractual grievance procedure. Yet Eitmann contends that his individual contract should be interpreted to supersede this provision. We do not agree.

It has been long settled that the explicit terms of a collective bargaining agreement do not necessarily establish its boundaries. The Supreme Court, in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), established that:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practice of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it.

Id. at 581-82, 80 S.Ct. at 1352; accord

Smith v. Kerrville Bus Co., Inc., 709 F.2d 914, 917 (5th Cir. 1983); Sanderson v. Ford Motor Co., 483 F.2d 102, 112 (5th Cir. 1973). In his complaint and in his deposition, Eitmann asserted that NOPSI advised him that all linemen were afforded the lifetime-employment treatment he seeks to obtain. To the extent that this assertion invokes the "industrial common law" of NOPSI's employment practices, therefore, Warrior & Gulf clearly establishes that such practices are part and parcel of the collective bargaining agreement and subject to its terms, including the grievance procedure.

Moreover, we note that section 13 of the collective bargaining agreement provided that "any disagreement or dispute" relating to the "meaning, interpretation or intention of this agreement" shall be subject to arbitration.

Warrior & Gulf makes it clear that a dispute with regard to company practices, policies, or customs that are not explicitly covered by the collective bargaining agreement is properly within the scope of the contractual grievance procedure. See also Oil, Chemical & Atomic Workers Union v. Amoco Chemical Corp., 589 F.2d 162, 164 (5th Cir.1979).

Our analysis is supported by the Supreme Court's recent interpretaion of J.I. Case, in Belknap, Inc. v. Hale, -- U.S. _____, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983). In Belknap, strike replacements brought suit against an employer in state court, alleging that their displacement by reinstated strikers constituted breach of a contract of permanent employment. The plaintiffs sought damages. The Supreme Court held that the plaintiffs' claims were not preempted by

the LMRA because they were "of only peripheral concern" to the federal labor law. 103 S.Ct. at 3182-84.[7]

Belknap is consistent with other Supreme Court cases addressing claims only tangentially related to federal labor law. In Linn v. Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed. 2d 582 (1966), the Court held that an action for false and malicious statements made in the course of a labor

7. The "peripheral concern" doctrine is based on San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959), where the Court held that the LMRA did not displace state regulation of all actions conceivably relating to a contract within the coverage of section 301:

> When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system...has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act.

359 U.S. at 243, 79 S.Ct. at 778-79 (footnote omitted).

dispute stated a claim under the state law. Similarly, in Farmers v. Carpenters, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), a state action for intentional infliction of emotional distress, even though the conduct arguably constituted an unfair labor practice, was held not to be preempted by the LMRA. And in Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, ____U.S. _____, 103 S.Ct. 2841, 77 L. Ed.2d 420 (1983), the Court noted in dictum that, e.g., a state battery suit arising out of a violent strike would not be preempted. 103 S.Ct. at 2854 n.28. See also Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) (state trespass action arising from picketing not subject to preemption).

The Belknap holding was premised on the notion that permitting the state action to proceed would not "frustrate any policy of the federal labor laws". 103 S.Ct. at 3184. The Belknap plaintiffs, for example, did not seek a remedy that, had it been awarded by a state court, would have encroached on the function or authority of the National Labor Relations Board, because the Board could not have granted any relief to the plaintiffs. Rather, the Court emphasized that the mere fact that the plaintiff's suit "related to" an unfair labor practice strike was insufficient to bring the suit within the jurisdiction of the Board. While acknowledging that the issue whether offering permanent jobs to replacements during such a strike constituted an unfair labor practice was a matter for the

Board, the Court held nonetheless:

> The focus of these determinations, however, would be on whether the rights of strikers were being infringed. Neither controversy would have anything in common with the question whether Belknap made misrepresenations to replacements that were actionable under state law. The Board would be concerned with the impact on strikers not with whether the employer deceived replacements.

103 S.Ct. at 3183. Thus, the interests of the federal labor laws on the one hand, and that of the state in providing a remedy for misrepresentation and breach of contract on the other, were held to be "discrete" concerns. Id. at 3184.

Belknap provides some guidance but is not dispositive of the case before us. The Court was not there presented with a situation in which employees who were covered by a collective bargaining agreement sought to bring an action on an

alleged separate contract. Rather, the Belknap plaintiffs sought relief that the LMRA did not afford them. See 103 S. Ct. at 3183. We think that J.I. Case would have mandated a different result had this circumstance been different in Belknap. Where, as here, an employee who is covered by the collective bargaining agreement seeks to redress a grievance subject to its terms, and seeks a remedy awardable by the arbitrator, we think it is clear that his avenue lies in the procedure provided by the collective bargaining agreement. Any state law cause of action is necessarily preempted by section 301. To hold otherwise in such a case would frustrate the policy of the federal labor laws. See Belknap.

III. Subject Matter Jurisdiction.

Having determined that Eitmann's

state law claim is preempted by federal labor law, we turn to the issue whether the district court would have had original jurisdiction over the action had it been brought in federal court. See Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972).[8] The federal courts have original jurisdiction over a claim that "arises under" a federal law regulating commerce. See 28 U.S.C. Section 1337 (1976 & Supp. V. 1981).[9] It is this "arising under" component of federal jurisdiction that

8. Grubbs establishes that this is the proper inquiry where, as here, an objection to removal is raised for the first time on appeal. Eitmann did not object to removal in the district court, nor did he move to have the case remanded to state court.

9. The "arising under" requirement of section 1337 has been interpreted to be the same as that found in 28 U.S.C. Section 1331 (1976 & Supp. V 1981), the grant of general question jurisdiction. See, e.g., Yancoskie v. Delaware River Port Authority, 528 F.2d 722 (3d Cir. 1975).

concerns us in this case. Eitmann contends that his claim arises not under federal but state law. NOPSI argues that Eitmann utilized "artful pleading" to cloak the true nature of his claim.

(4) The "arising under" jurisdiction of the federal courts is a subject on which few courts or commentators have been silent. See, e.g., Powers v. South Central United Food & Commercial Workers Unions, 719 F.2d 760, 763 n.1 (5th Cir.1983) (collecting cases and commentary). This prolixity, however, has not resulted in standards upon which there is universal agreement. Nonetheless, a fundamental premise underlying "arising under" jurisdiction is embodied in the "well-pleaded complaint" rule. That doctrine provides:

> (W)hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdic-

> tional statute... must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.

Taylor v. Anderson, 234 U.S. 74, 75-76, 34 S.Ct. 724, 724-25, 58 L.Ed. 1218 (1914); see also Franchise Tax Board, Supra; Gully v. First National Bank in Meridian, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed.70 (1936); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908). Pursuant to the well-pleaded complaint rule, therefore, a defendant "may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." Franchise Tax Board, 103 S.Ct. at 2847 (emphasis in original).

(5) An independent corollary of the well-pleaded complaint rule, however, establishes that a plaintiff may not defeat removal by fraudulent means or by "artfully" omitting to plead essential federal issues in the complaint. See Franchise Tax Board, 103 S.Ct. at 2853; Avco Corp. v. Aero Lodge No. 735, supra. In such a case, courts will not permit rigid application of the well-pleaded complaint doctrine to aid a plaintiff's attempt to circumvent federal jurisdiction. Thus, where the artful pleading analysis is appropriate, removal is proper despite the absence of a federal issue on the face of the complaint. See, e.g., Avco, supra.

(6) In their application of the well-pleaded complaint rule, many courts have held that federal preemption of state law constitutes a defense to the plain-

tiff's action, and does not confer original jurisdiction in the federal courts. This position is exemplified by the Third Circuit's approach in Trent Realty Associates v. First Federal Savings and Loan Ass'n of Philadelphia, 657 F.2d 29 (3d Cir. 1981). There, the defendant sought removal of a state court action, seeking a declaratory judgment that a mortgage penalty was unenforceable. The defendant asserted that its right to assess the penalty was protected by the Home Owners' Loan Act of 1933; thus, the plaintiff's complaint necessarily interposed a substantial federal issue. The court disagreed, holding that although the Act may preempt state law to the contrary, the federal issue nonetheless was one asserted by way of a defense, thus contravening Mottley and Gully, and would not

support removal jurisdiction. 657 F.2d at 34.[10] Accord First Nat'l Bank of Aberdeen v. Aberdeen Nat'l Bank, 627 F. 2d 843 (8th Cir.1980) (en banc) (National Bank Act); Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972) (antitrust); Bailey v. Logan Square Typographers, Inc., 441 F.2d 47 (7th Cir. 1971). To the same effect, we held recently that a defense based on ERISA's asserted preemptive effect did not provide removal jurisduction. See Powers, supra.

This line of cases, however, presents a problem different from the one before us today. Here, the preemptive force asserted to render original federal jurisdiction appropriate is the

10. The court explicitly noted, however, that Trent Realty did not present a case of "artful pleading." 657 F.2d at 35 n. 2.

federal labor law. We think that this distinction is determinative.

In Avco Corp. v. Aero Lodge No. 735, supra, the Supreme Court considered whether a state law claim that was pre-empted by section 301 could properly be removed to federal court where the plaintiff had not invoked section 301 on the face of the complaint. In deciding that section 301's preemptive effect provided "arising under" jurisdiction under section 1337, the Court held that it was clear that the collective bargaining agreement claim at issue was "one arising under the 'laws of the United States' within the meaning of the removal statute." 390 U.S. at 560, 88 S.Ct. at 1237. Moreover, the Franchise Tax Board Court, in distinguishing the case before it--which involved the propriety of removing an ERISA-preempted

state claim--from Avco, noted:

> The necessary ground of decision (in Avco) was that the preemptive force of Section 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of Section 301. Avco stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

103 S.Ct. at 2853-54 (emphasis added). Thus, courts that have addressed the effect of preemption by section 301 have held that the federal courts have original subject matter jurisdiction over the action. See, e.g., Fristoe v. Reynolds Metal Co., 615 F.2d 1209 (9th Cir. 1980); Johnson v. England, 356 F.2d 44 (9th Cir.), cert. denied,

384 U.S. 961, 86 S.Ct. 1587, 16 L.Ed.2d 673 (1966); Portley v. Kaiser Hospitals, 15 L.R.R.M. 2629 (BNA) N.D. Cal.1983); Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear and Allied Workers' Union, 511 F.Supp. 1180 (S.D.N.Y. 1981); Talbot v. National Super Markets of Louisiana, 372 F.Supp. 1050 (E.D.La. 1974); Klepacky v. Kraftco Corp., 80 L.R.R.M. 3144 (BNA) (D.Conn. 1972). See generally 14 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction Section 3722 (1976). Cf. Medlin v. Boeing Vertol Co., 620 F.2d 957, 962 (3d Cir. 1980) (where prior arbitration determined that collective bargaining agreement did not cover plaintiff's claim, state contract action not precluded because alleged rights did not arise under collective bargaining agreement).

We think that Avco and its progeny are persuasive with regard to the issue before us. Therefore, we hold that, where a state cause of action is pre-empted by section 301, the federal courts have original subject matter jurisdiction over the action despite the absence of a federal claim on the face of the complaint. In such a case, which raises the spectre of "artful pleading," the court must necessarily be guided by the substance rather than the form of the complaint. In re Carter, 618 F.2d 1093 (5th Cir. 1980), cert. denied sub nom. Sheet Metal Workers v. Carter, 450 U.S. 949, 101 S.Ct. 1410, 67 L.Ed.2d 378 (1981); Villarreal v. Brown Express, Inc., 529 F.2d 1219 (5th Cir. 1976); Romick v. Bekins Van

& Storage Co., 197 F.2d 369 (5th Cir. 1952).[11] We think that, in a case such as this, to limit our inquiry to the face of the complaint would unduly hamper the policy underlying Section 301. Thus, because NOPSI's petition for removal clearly demonstrated that Eitmann's cause of action "arose under" section 301, the district court had original jurisdiction over the action.

11. We note that under Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed2d 103 (1981), Eitmann's aborted grievance attempt alone could arguably form the basis for a finding of artful pleading. In Moitie, the plaintiff originally brought suit in federal court for fede-al antitrust violations. When the case was dismissed for failure to state a claim, the plaintiff refiled in state court, alleging antitrust violations based on the same transactions and theories set forth in the original complaint, but couched solely in terms of state law. The Supreme Court sanctioned removal, holding that the plaintiff's "artful pleading" was merely a device to avoid explicitly raising "essential federal law claims." 452 U.S. at 397 n. 2, 101 S.Ct. at 2427 n.2. Here, Eitmann does not contend that his original invocation of the grievance procedure was based on any transactions or theories different from

IV. Summary Judgment.

Eitmann's contention that summary judgment was improper is premised on his assertion that the district court lacked subject matter jurisdiction over the action. The foregoing discussion demonstrates our disagreement with this premise. We find, therefore, that the district court's summary judgment in favor of NOPSI was correct.

AFFIRMED.

those he alleged in this suit. In his grievance letter, Eitmann sought reinstatement and alleged that his dismissal was unjust under Section 8 of the collective bargaining agreement:

> The specific provision of the agreement, the company policy and work rules which are alleged to have been violated involved the continuing past practice of this company which existed prior to my employment and continued throughout my employment by which the workers and employees who sustained injuries on the job are continued in the employ of the company at full pay until complete recovery or retirement, whichever occurs first.

Eitmann Dep. Exh. 7.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 82-3705

ARMOND J. EITMANN,

PLAINTIFF-APPELLANT,

VERSUS

NEW ORLEANS PUBLIC SERVICE, INC.,

DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ON PETITION FOR REHEARING AND

SUGGESTION FOR REHEARING EN BANC

(Opinion 4/23/84, 5 Cir. 1984, _____F.2d

_____).

Before RUBIN and RANDALL, Circuit

Judges and MITCHELL, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Denier Randall
United States Circuit Judge

Filed and stamped

May 31, 1984

Clerk, U.S. Court of Appeals

Gilbert F. Ganucheau, Clerk

CIVIL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 82-2824

DIVISION "I"

ARMOND J. EITMANN,

VS

NEW ORLEANS PUBLIC SERVICE, INC.

FILED: _____ _____
DEPUTY CLERK

SUIT ON A CONTRACT

The petition of ARMOND J. EITMANN, of the full age of majority and a resident of and domiciled in the Parish of Jefferson, State of Louisiana, with respect represents that:

I

Defendant, NEW ORLEANS PUBLIC SERVICE, INC., a Louisiana corporation

domiciled in the Parish of Orleans, State of Louisiana, is justly and truly indebted to petitioner in the full sum of TWELVE MILLION TWO HUNDRED FIFTY THOUSAND ($ 12,250,000.00) DOLLARS, plus legal interest thereon from the date of judicial demand until paid, plus retirement benefits from age sixty-five until his death, and all costs of these proceedings, for the following reasons:

II

Petitioner was employed by NEW ORLEANS PUBLIC SERVICE, INC., in approximately 1969, and worked for said company until he was discharged on November 25, 1977.

III

At the time of petitioner's employment with Defendant, as a substantial and primary portion of the consideration

for his employment and the motivation for accepting employment with the Defendant, petitioner was informed both by Defendant and by knowledge of the practices of Defendant that when an employee of Defendant sustained a job related injury which rendered him incapable of continuing to perform his duties, Defendant would maintain that employee in the employ of Defendant at the rate of pay being earned by the employee prior to the injury, despite the fact that easier or less demanding work would be required to be provided in order to maintain said employment.

IV

The work in which Defendant was engaged was extremely hazardous, involving danger to employees in the course of dealing with extremely high voltage and climbing substantial heights.

V

On the strength of the representations by Defendant and the practices of Defendant in guaranteeing full employment to its employees despite any job related injuries sustained, until that employee recovered in full or until the employee reached retirement age, petitioner accepted employment with Defendant and performed satisfactorily as a lineman until he sustained substantial injuries to his back on February 17, 1976.

VI

Defendant initially honored its employment agreement with Plaintiff by paying Plaintiff's full salary during his period of medical treatment and convalescence and by providing lighter work suitable to Plaintiff's capabilities following back surgery.

VII

Despite the initial compliance with its work agreement, on or about November 25, 1977, Defendant reversed its position and refused to provide lighter work for Plaintiff and refused to maintain him on his full salary and, in fact, discharged Plaintiff from Defendant's employ.

VIII

As a result of the actions of Defendant in discharging Plaintiff, contrary to the agreements and understandings which had existed between Plaintiff and Defendant and despite Defendant's contractual obligations to Plaintiff, Plaintiff has been unemployed since November 25, 1977, and continues to be unemployed because of the injuries which he has sustained preventing him from obtaining any other work.

IX

Plaintiff estimates that his earnings for the period from the date of his discharge until his eligibility for retirement would have been at least TWELVE MILLION TWO HUNDRED FIFTY THOUSAND ($ 12,250,000.00) DOLLARS, in addition to the retirement benefits to which Plaintiff would have been entitled upon his retirement.

X

Petitioner alleges that he has sustained damages because of Defendant's breach of contract amounting to TWELVE MILLION TWO HUNDRED FIFTY THOUSAND ($ 12,250,000.00) DOLLARS, plus the loss of his retirement benefits.

WHEREFORE, Plaintiff prays that Defendant be served with a copy of this petition, that he be cited to appear and answer it, that after all legal delays

and due proceedings had, there be Judgment herein in favor of Plaintiff, ARMOND J. EITMANN, and against Defendant, NEW ORLEANS PUBLIC SERVICE, INC., in the full and true sum of TWELVE MILLION TWO HUNDRED FIFTY THOUSAND ($ 12,250,000.00) DOLLARS, plus all retirement benefits due to Plaintiff upon reaching his sixty-fifth birthday, with judicial interest on all sums from the date of judicial demand until paid, and all costs of these proceedings.

/s/ Ferdinand J. Kleppner
FERDINAND J. KLEPPNER
Attorney for Plaintiff
Law Firm of FERDINAND J. KLEPPNER
3224 North Turnbull Drive
Metairie, Louisiana 70002
887-6571

PLEASE SERVE DEFENDANT:

NEW ORLEANS PUBLIC SERVICE, INC.

through its agent for service of process,

MR. SHERWOOD A. CUYLER, OR

MR. JOHN H. CHAVANNE, OR

MR. JAMES M. CAIN, at

317 Baronne Street,
New Orleans, Louisiana 70112